

- "I. The Administrative Law Judge arbitrarily failed to appoint one or two health care providers as contemplated in K.S.A. 44-528(a), failed to

consider the adequacy or inadequacy of the award, and failed to consider Claimant's inability to engage in any gainful employment or the increased restrictions on Claimant, considering only the Employer's doctor's estimate of impairment of function, disregarding overwhelming evidence in the record of Claimant's increased disabilities.

- "II. A review of the evidence in the record reveals that the award is inadequate, Claimant's impairment of function and work disability have increased, and the circumstances for a just determination require the award be increased in accordance with Claimant's total inability to obtain work or obtain earnings in the open labor market."

#### **FINDINGS OF FACT AND CONCLUSIONS OF LAW**

Having reviewed the whole evidentiary record filed herein and, in addition, the stipulations of the parties, the Appeals Board makes the following findings of fact and conclusions of law:

In the original Award dated January 14, 1994, Special Administrative Law Judge William F. Morrissey granted claimant benefits for a 25 percent permanent partial impairment of function to the left leg. Claimant requested review by the Appeals Board and was granted permanent disability benefits based upon a 45 percent permanent partial impairment of function to the body as a whole as a result of his work-related injury of June 16, 1989. On September 14, 1995, respondent filed its request for review and modification pursuant to K.S.A. 1988 Supp. 44-528, alleging claimant's condition had changed, that his functional impairment had diminished and that respondent was entitled to a reduction in claimant's compensation.

K.S.A. 1988 Supp. 44-528(a) provides in relevant part:

"Any award . . . may be reviewed by the director for good cause shown upon the application of the employee, employer . . . . The director shall hear all competent evidence offered and if the director finds that the award has been obtained by fraud or undue influence, that the award was made without authority or as a result of serious misconduct, that the award is excessive or inadequate or that the functional impairment or work disability of the employee has increased or diminished, the director may modify such award . . . ."

The only medical evidence in the record is that of Dr. Philip R. Mills, a board-certified physiatrist, certified by the American Board of Independent Evaluators. Dr. Mills examined claimant first on October 18, 1994 and again on July 25, 1995. He opined claimant's functional impairment had decreased from the 45 percent originally awarded by the Appeals Board to a 20 percent permanent partial impairment of function. Dr. Mills based his opinion not only upon the review of medical records of Dr. Frank J. Kutilek III, but also upon his examination of claimant and upon his review of videotapes taken of claimant by respondent and presented to the doctor. Dr. Mills noted that claimant's physical disabilities on tape appeared to be significantly less than those represented during his office examination of claimant. He found it particularly interesting that in the video claimant did not appear to limp, did not require a cane, and had overall functional mobility

in excess of that portrayed during the doctor's examination of claimant. He also noted that the cane used by claimant in his office was held in the wrong hand and did not appear to be worn.

The Administrative Law Judge, in adopting Dr. Mills' opinion that claimant had a functional impairment of 20 percent to the body as whole, found the medical evidence of Dr. Mills to be uncontradicted. Uncontradicted evidence which is not improbable or unreasonable may not be disregarded unless it is shown to be untrustworthy. Anderson v. Kinsley Sand & Gravel, Inc., 221 Kan. 191, 558 P.2d 146 (1976).

In workers compensation proceedings, the burden of proof is upon the claimant to establish claimant's right to an award of compensation by proving various conditions upon which claimant's right depends by a preponderance of the credible evidence. K.S.A. 44-501 and K.S.A. 44-508(g). When review and modification is requested, it is the burden of the party seeking the modification to prove that such modification is warranted by showing that the award had been obtained by fraud or undue influence, was made without authority as a result of serious misconduct, was excessive or inadequate, or that the functional impairment or work disability of an employee had increased or diminished.

Claimant raised issue with the Administrative Law Judge's refusal to appoint one or more health care providers as contemplated in K.S.A. 1988 Supp. 44-528(b) to examine the employee and report to the Administrative Law Judge. In light of the uncontradicted evidence of Dr. Mills, the Administrative Law Judge's refusal to so appoint additional medical examiners is understandable.

Claimant argues that the claimant's own testimony is sufficient to contradict the opinion of Dr. Mills and that claimant should be awarded a substantial work disability. The Appeals Board finds a total lack of evidence in the record regarding claimant's alleged work disability. The only evidence in support of claimant's request for work disability is the testimony of the claimant himself. In reviewing the testimony of the claimant as compared to the videotape evidence placed into record by the respondent, the Appeals Board questions the legitimacy of claimant's complaints and allegations. Claimant contends in his testimony to be substantially impaired to the point of being incapable of any physical labor and further incapable of earning any wages in the open labor market. Claimant also testified to serious physical imitations in his ability to stand, walk, bend, stoop, twist, squat and ambulate without use of a cane. The videotape shows claimant to be physically capable of substantially more than that which he admitted to in his testimony.

In considering the whole record, the Appeals Board finds that the testimony of Dr. Mills coupled with the videotape evidence of claimant are the more credible evidence of claimant's abilities and inabilities. As such, the Appeals Board finds that claimant's functional impairment has been reduced and the Award of Administrative Law Judge John D. Clark reducing claimant's award to 20 percent of the body as a whole is supported by the evidence and should be affirmed.

### **AWARD**

**WHEREFORE**, it is the finding, decision, and order of the Appeals Board that the Award of Administrative Law Judge John D. Clark dated January 12, 1996, should be, and is hereby, affirmed in all respects and claimant is entitled to 115.29 weeks compensation for an award of review and modification at the rate of \$45.88 per week totaling \$5,289.51

for a 20 percent permanent partial general bodily disability making a total award of \$5,289.51.

As of May 24, 1996, there would be due and owing to claimant 62 weeks permanent partial disability compensation at the rate of \$45.88 per week in the sum of \$2,844.56 for a total due and owing of \$2,844.56 which is ordered paid in one lump sum minus amounts previously paid. Thereafter, the remaining balance in the amount of \$2,444.95 shall be paid at rate of \$45.88 per week for 53.29 weeks or until further order of the Director.

Fees necessary to defray the expenses of administration of the Workers Compensation Act are hereby assessed against the respondent to be directly paid as follows:

Barber & Associates

Transcript of Motion Hearing	\$75.10
Deposition of Philip R. Mills, M.D.	\$148.00
Deposition of Kevin Wray	\$157.00
Deposition of Edward L. Anderson	\$341.50

**IT IS SO ORDERED.**

Dated this \_\_\_\_ day of June 1996.

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BOARD MEMBER

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BOARD MEMBER

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BOARD MEMBER

c: William Fry, Wichita, KS  
Terry Torline, Wichita, KS  
Cortland Clotfelter, Wichita, KS  
John D. Clark, Administrative Law Judge  
Philip S. Harness, Director